STATE OF MICHIGAN

COURT OF APPEALS

SANDRA WEAVER,

Plaintiff-Appellant,

v

LAURA EISELE and TOWNSHIP OF HANDY,

Defendants-Appellees.

UNPUBLISHED
January 18, 2007

No. 270994
Livingston Circuit Court
LC No. 05-021254-CL

Before: Murray, P.J., and Fitzgerald and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order of the trial court granting summary disposition to defendants. We affirm.

I. Facts and Proceedings

In November 2000, defendant Laura Eisele, the township clerk, hired plaintiff to work part time as her deputy clerk. Plaintiff had no written employment contract with defendant township and she understood Eisele had the right to fire her. Plaintiff never reviewed any writings or policies that suggested she could stay at the township for as long as she did a good job. After she was hired as deputy clerk, plaintiff was appointed recording secretary for the planning commission, also on a part-time basis. Defendant Eisele testified that, as a member of the township board that appointed plaintiff as recording secretary, she was sure she voted in favor of the hire. However, defendant Eisele also testified that she believed plaintiff "allowed her Planning Commission job to get in the way of performing her duties as a deputy clerk," and that although plaintiff was never disciplined for misconduct as deputy clerk, the pair had their disagreements.

Plaintiff testified that in late October or early November 2004, defendant Eisele advised her that she was considering dividing the duties of deputy clerk and recording secretary to the planning commission. Defendant Eisele brought the issue up before the township board, and in November 2004 the board unanimously voted to divide the duties. Another individual was then installed as recording secretary, with plaintiff being retained as deputy clerk. Plaintiff testified that on December 17, 2004, she submitted a letter to the township supervisor expressing an interest in becoming a full member of the planning commission. Plaintiff did not give defendant

Eisele prior notification that she would be sending the letter, and believed that she could retain her duties as the deputy clerk while serving as a member of the planning commission.

Defendant Eisele fired plaintiff on December 30, 2004. Plaintiff testified that defendant Eisele initially told her she "did [her] job to perfection." But then, according to plaintiff, defendant Eisele's "manner changed and she very loudly stated [that she] intended to completely separate [plaintiff] from the planning commission." While they disagree on when the following statement was made, both defendant Eisele and plaintiff testified that defendant Eisele also told plaintiff, "I'll be damned if I'll let any deputy clerk of mine be on the planning commission and have the ability to recommend to me what to do."

Defendants eventually moved the trial court for entry of an order granting them summary disposition of plaintiff's complaint. On May 25, 2006, the trial court entered a well-written and reasoned opinion and order granting defendants' motion, and denying plaintiff's motion to amend her complaint. The trial court held that plaintiff had not established a genuine issue of material fact, and that her employment was merely at will; that her termination did not violate any of the "public policy" exceptions to at will employment; that plaintiff had not established a prima facie case of intentional infliction of emotional distress, and that plaintiffs attempt to amend her complaint was futile. This appeal, on every issue except the dismissal of the intentional infliction of emotional distress claim, has now ensued.

II. Analysis

Plaintiff argues that granting defendants' motion was not appropriate because there is a genuine issue of material fact with respect to whether plaintiff had an employment contract with defendant township allowing it to terminate her employment only for cause. We disagree. We review "the grant or denial of a summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

Pursuant to statute, a deputy clerk "serve[s] at the pleasure of the clerk." MCL 41.69. "Generally, either party to an at-will employment agreement may terminate it at any time and for any, or even no, reason." *Psaila v Shiloh Industries, Inc*, 258 Mich App 388, 391; 671 NW2d 563 (2003). "[T]he presumption of at-will employment is overcome with proof of either a contract provision for a definite term of employment or one that forbids discharge absent just cause." *Lytle v Malady* (*On Rehearing*), 458 Mich 153, 164; 579 NW2d 906 (1998). There are three accepted ways by which a plaintiff can prove such contractual terms: "(1) proof of 'a contractual provision for a definite term of employment or a provision forbidding discharge absent just cause;' (2) an express agreement, either written or oral, regarding job security that is clear and unequivocal; or (3) a contractual provision, implied at law, where an employer's policies and procedures install a 'legitimate expectation' of job security in the employee." *Id.* (citations omitted). "[A] mere subjective expectancy on the part of an employee" is insufficient to create a jury question as to whether an employment contract may be terminated only for just cause. *Schwartz v Mich Sugar Co*, 106 Mich App 471, 478; 308 NW2d 459 (1981).

Plaintiff argues that the Michigan Supreme Court's holding in *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579; 292 NW2d 880 (1980), demonstrates that she was not

an at-will employee. In *Toussaint*, our Supreme Court held that "an employer's express agreement to terminate only for cause, or statements of company policy and procedure to that effect, can give rise to rights enforceable in contract." *Id*. at 610. *Toussaint* stated that "[w]hen a prospective employee inquires about job security and the employer agrees that the employee shall be employed as long as he does the job, a fair construction is that the employer has agreed to give up his right to discharge at will without assigning cause and may discharge only for cause." *Id*. *Toussaint* reasoned that "where an employer chooses to establish such policies and practices and makes them known to its employees, the employment relationship is presumably enhanced," and as such, the employer has "created a situation 'instinct with an obligation.'" *Id*. at 613 (citations omitted).

However, unlike in *Toussaint*, plaintiff did not "inquire[] about job security" as a "prospective employee," and defendant Eisele did not agree that plaintiff "would be employed as long as [she] does the job." *Id*. at 610. In fact, at no point during her term of employment did defendant Eisele expressly agree to terminate plaintiff only for cause. *Id*. Indeed, plaintiff admitted that she understood defendant Eisele retained the right to fire her, and testified she received no written policies or statements indicating she was not an at-will employee. It is true that defendant Eisele increased plaintiff's wages and job duties and continued to update her future plans. However, "[s]pecific terms of the contract, i.e., compensation benefits, may vary from time to time," without altering the nature of an at-will contract. *Feahany v Caldwell*, 175 Mich App 291, 302; 437 NW2d 358 (1989) overruled in part on other grounds *Health Call of Detroit v Atrium Home & Health Care Services, Inc*, 268 Mich App 83; 706 NW2d 843 (2005). Moreover, increasing plaintiff's job duties and keeping her informed of future plans constituted only an affirmation of the quality of plaintiff's work up to that time. See *Grow v Gen Products Inc*, 184 Mich App 379, 382, 386; 457 NW2d 167 (1990) (generalized statements to an employee that she is performing well and an asset to the employer are insufficient to establish a jury question on his claim for a just-cause termination contract). In any event, "mere subjective expectancy" is insufficient to create a jury question as to whether an employment contract may be terminated only for just cause. *Schwartz, supra* at 478.

Finally, plaintiff is unable to prove that defendant's policies and procedures instilled a "legitimate expectation" of job security. *Lytle*, *supra* at 163 (citation and quotation marks omitted). The Supreme Court in *Rood v Gen Dynamics Corp*, 444 Mich 107, 138-139; 507 NW2d 591 (1993), described a two-step analysis for a legitimate expectations claim: (1) determine "what, if anything, the employer has promised," and (2) determine whether the promise is reasonably capable of instilling a legitimate expectation of just-cause employment in the employer's employees. "A claim based on legitimate expectations rests on the employer's promises to the work force in general rather than to an individual employee." *Nieves v Bell Industries, Inc*, 204 Mich App 459, 464; 517 NW2d 235 (1994).

That being the case, if an employer's policies and procedures are incapable of reasonably supporting a legitimate expectation of just cause employment, the plaintiff's complaint should be dismissed upon the defendant's motion for summary disposition. *Rood*, *supra* at 140-141. However, if the employer's policies are "capable of two reasonable interpretations, the issue is for the jury." *Id*.

In this case, there is no evidence that defendant made promises to the work force in general. Additionally, plaintiff points to no oral statements that led her to believe her employment contract was for just cause, so a jury would have no language to even evaluate to determine what meaning "reasonable persons might attach" to it under the circumstances. Although plaintiff indicated she thought that continued employment was implied because "if you are not doing a good job, then, you know, someone wouldn't be giving you more work," a mere subjective expectation on the part of an employee is insufficient to create a jury question as to whether an employment contract may be terminated only for just cause. *Schwartz*, *supra* at 471.

We also agree with the trial court's conclusion that plaintiff did not present sufficient evidence that she was terminated in violation of the narrow public policy exception to the at will employment doctrine. *Vagts v Perry Drug Stores Inc*, 204 Mich App 481, 484; 516 NW2d 102 (1994). Plaintiff has pointed to no statute prohibiting her discharge under these circumstances, nor has she alleged that she was about to report a violation of the law before she was terminated. *Id*. Plaintiff has also failed to adequately explain how her termination violated her right to free speech, and has offered us no authority establishing that to be the case. *Weiss v Hodge* (*After Remand*), 223 Mich App 620, 637; 567 NW2d 468 (1997).

Plaintiff also argues the trial court erred by denying her motion for leave to amend the complaint. We disagree. Plaintiff filed a motion to amend her pleadings to include a claim that her constitutional rights to freedom of speech were violated in retaliation for applying to the planning commission. We review "a trial court's decision regarding amendment of a complaint . . . for an abuse of discretion." *Liggett Restaurant Group, Inc v Pontiac*, 260 Mich App 127, 138; 676 NW2d 633 (2003).

With respect to amendment of pleadings more than 14 days after the initial pleading has been served, as is the case here,[1] MCR 2.118(A)(2) states, in pertinent part, "a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires." Furthermore, "[a] trial court is required to permit amendment of pleadings to avoid summary disposition, unless such amendment would be futile." *Blue Water Fabricators, Inc v New Apex Co*, 205 Mich App 295, 299; 517 NW2d 319 (1994), MCR 2.116(I)(5). "An amendment would be futile if: (1) ignoring the substantive merits of the claim, it is legally insufficient on its face, (2) it merely restates allegations already made, or (3) it adds a claim over which the court lacks jurisdiction." *PT Today, Inc v Comm'r of the Office of Financial and Ins Services*, 270 Mich App 110, 143; 715 NW2d 398 (2006) (citations omitted).

Here, plaintiff sought to amend the complaint to include a count for "Violation of Plaintiff's Constitutional Rights pursuant to the Michigan Constitution of 1963, Section 5, in that defendant's [sic] materially prejudiced [plaintiff] by terminating her from her position for exercising her free speech, restrain [sic] and abridged her liberty of speech, and express [sic] her views by applying for the Position of Planning Commissioner." However, Counts II and III of

[1] The original complaint was filed February 22, 2005. The motion to amend was filed on April 10, 2006.

plaintiff's original complaint accused defendant of "violat[ing] the public policy of the State of Michigan, specifically the Constitution of Michigan of 1963, Sections 1, 2, and 5;" alleged that defendant Eisele discharged plaintiff "for exercising her Constitutional rights to apply to become a Member of the Handy Township Planning Commission;" and declared that "[a]s a direct and proximate result of [defendants'] breach of public policy of the State of Michigan," plaintiff suffered damages. Thus, plaintiff merely restated her previous assertions and her amended complaint would have been futile. *Dowerk v Oxford Charter* Twp, 233 Mich App 62, 75-76; 592 NW2d 724 (1998). Accordingly, the trial court did not abuse its discretion in refusing to grant plaintiff's motion to amend her complaint.

Affirmed.

/s/ Christopher M. Murray
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens